

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 03-0285V

Filed: November 6, 2012

Not to be Published

**WILLIAM TALLEY and
AMY TALLEY, parents of
HARRISON TALLEY, a minor,**

Petitioners,

v.

**SECRETARY OF HEALTH AND HUMAN
SERVICES**

Respondent.

**Autism; Failure to Prosecute; Failure
to Follow Court Orders; Dismissal**

DECISION¹

On February 10, 2003, William Talley and Amy Talley (“petitioners”) filed a petition for Vaccine Compensation in the National Vaccine Injury Compensation Program (“the Program”),² alleging that Harrison was injured by a vaccine or vaccines listed on the Vaccine Injury Table. See § 14.

On October 28, 2011, petitioners were ordered to inform the court whether petitioners intended to proceed with this case. Petitioners failed to respond. On March

¹ Because this unpublished decision contains a reasoned explanation for the action in this case, I intend to post this decision on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2913 (codified as amended at 44 U.S.C. § 3501 note (2006)). In accordance with Vaccine Rule 18(b), petitioner has 14 days to identify and move to delete medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will delete such material from public access.

² The Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755, codified as amended, 42 U.S.C. §§ 300aa-10 *et seq.* (hereinafter “Vaccine Act” or “the Act”). Hereafter, individual section references will be to 42 U.S.C. § 300aa of the Act.

23, 2012, petitioners were again ordered to inform the court whether petitioners intended to proceed with this case or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. On June 4, 2012, petitioners filed a response indicating they wished to proceed with their claim and that petitioners' counsel would be withdrawing as counsel of record.

Petitioners' counsel filed a motion to withdraw as counsel on July 5, 2012 and a motion for interim fees and costs on July 24, 2012. I entered a decision awarding interim fees and costs on August 13, 2012 and granted counsel's motion to withdraw on August 21, 2012. Petitioners were ordered to contact my chambers to schedule a telephonic status conference so I could discuss the next steps in this case now that petitioners were proceeding as a pro se petitioners. See Order, filed August 21, 2012, at 2. Petitioners failed to respond. On October 1, 2012, petitioners were again ordered to contact my chambers to schedule a telephonic status conference or otherwise show cause within thirty days, why this case should not be dismissed for failure to prosecute. Petitioners have failed to respond.³

I. The Omnibus Autism Proceeding.

This case is one of more than 5,400 cases filed under the Program in which petitioners alleged that conditions known as "autism" or "autism spectrum disorders" ["ASD"] were caused by one or more vaccinations. A detailed history of the controversy regarding vaccines and autism, along with a history of the development of the OAP, was set forth in the six entitlement decisions issued by three special masters as "test cases" for two theories of causation litigated in the OAP and will not be repeated here.⁴

Ultimately, the Petitioners' Steering Committee ["PSC"], an organization formed by attorneys representing petitioners in the OAP, litigated six test cases presenting two different theories on the causation of ASDs. The first theory alleged that the measles portion of the measles, mumps, rubella vaccine could cause ASDs. That theory was presented in three separate Program test cases during several weeks of trial in 2007. The second theory alleged that the mercury contained in thimerosal-containing vaccines could directly affect an infant's brain, thereby substantially contributing to the causation of ASD. That theory was presented in three additional test cases during several weeks of trial in 2008.

³ The court's October 1, 2012 Order to Show Cause was returned as unclaimed. However, the Order to Show Cause was sent to the same address as the court's August 21, 2012 Order which was sent by regular mail and not returned.

⁴ The Theory 1 cases are *Cedillo v. Sec'y, HHS*, No. 98-916V, 2009 WL 331968 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Hazlehurst v. Sec'y, HHS*, No. 03-654V, 2009 WL 332306 (Fed. Cl. Spec. Mstr. Feb. 12, 2009); *Snyder v. Sec'y, HHS*, No. 01-162V, 2009 WL 332044 (Fed. Cl. Spec. Mstr. Feb. 12, 2009). The Theory 2 cases are *Dwyer v. Sec'y, HHS*, No. 03-1202V, 2010 WL 892250 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *King v. Sec'y, HHS*, No. 03-584V, 2010 WL 892296 (Fed. Cl. Spec. Mstr. Mar. 12, 2010); *Mead v. Sec'y, HHS*, No. 03-215V, 2010 WL 892248 (Fed. Cl. Spec. Mstr. Mar. 12, 2010).

Decisions in each of the three test cases pertaining to the PSC's first theory rejected the petitioners' causation theories. *Cedillo*, 2009 WL 331968, *aff'd*, 89 Fed. Cl. 158 (2009), *aff'd*, 617 F.3d 1328 (Fed. Cir. 2010); *Hazlehurst*, 2009 WL 332306, *aff'd*, 88 Fed. Cl. 473 (2009), *aff'd*, 604 F.3d 1343 (Fed. Cir. 2010); *Snyder*, 2009 WL 332044, *aff'd*, 88 Fed. Cl. 706 (2009).⁵ Decisions in each of the three "test cases" pertaining to the PSC's second theory also rejected the petitioners' causation theories, and petitioners in each of the three cases chose not to appeal. *Dwyer*, 2010 WL 892250; *King*, 2010 WL 892296; *Mead*, 2010 WL 892248. Thus, the proceedings in these six test cases are concluded. Petitioners remaining in the OAP must now decide whether to pursue their cases, and submit new evidence on causation, or take other action to exit the Program. The petitioners in this case have failed to inform the court how they intend to proceed.

II. Failure to Prosecute.

It is petitioners' duty to respond to court orders. Failure to respond to a court order will not be tolerated. As I reminded petitioners in my October 1, 2012, order, failure to follow court orders, as well as failure to file medical records or an expert medical opinion, shall result in dismissal of petitioner's claim. *Tsekouras v. Sec'y, HHS*, 26 Cl. Ct. 439 (1992), *aff'd per curiam*, 991 F.2d 810 (Fed. Cir. 1993); *Sapharas v. Sec'y, HHS*, 35 Fed. Cl. 503 (1996); Vaccine Rule 21(b).

III. Causation In Fact.

To receive compensation under the Program, petitioners must prove either 1) that Harrison suffered a "Table Injury" – i.e., an injury falling within the Vaccine Injury Table – corresponding to one of Harrison's vaccinations, or 2) that Harrison suffered an injury that was actually caused by a vaccine. See §§ 13(a)(1)(A) and 11(c)(1). Under the Vaccine Act, a special master cannot find a petitioner has proven her case by a preponderance of the evidence based upon "the claims of a petitioner alone, unsubstantiated by medical records or by medical opinion." § 13(a). An examination of the record did not uncover any evidence that Harrison suffered a "Table Injury." Further, the record does not contain a medical opinion or any other persuasive evidence indicating that Harrison's autism spectrum disorder was vaccine-caused.

Accordingly, it is clear from the record in this case that petitioners have failed to demonstrate either that Harrison suffered a "Table Injury" or that Harrison's injuries were "actually caused" by a vaccination. **This case is dismissed for insufficient proof and for failure to prosecute. The clerk shall enter judgment accordingly.**

IT IS SO ORDERED.

Denise K. Vowell
Special Master

⁵ Petitioners in *Snyder* did not appeal the decision of the U.S. Court of Federal Claims.